

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

AUG 4, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Hygrade Food Products Corp.

v.

CRB Co.¹

Opposition No. 103,744
to application Serial No. 74/626,376
filed on January 27, 1995

J. David Mayberry of Kilpatrick Stockton LLP for Hygrade
Food Products Corp.

Gordon D. Kinder of Renner Otto Boisselle & Sklar for CRB Co.

Before Sams, Seeherman and Hairston, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Hygrade Food Products Corp. has opposed the application
of CRB Co. to register the mark BALLPARK DRAFT ("DRAFT" is
disclaimed) for beer.² As grounds for opposition, opposer

¹ The parties are involved in a civil action (Civil Action 1:99
CV 533) before the U.S. District Court for the Northern District
of Ohio. The civil action has been suspended pending disposition
of this opposition.

² Application Serial No. 74/626,376 filed January 27, 1995,
asserting a bona fide intention to use the mark in commerce. The

alleges that applicant's mark, when used in connection with the identified goods, so resembles opposer's previously used and registered mark BALL PARK for frankfurters and other processed food products, as to be likely to cause confusion. In addition, opposer alleges that registration of the mark BALLPARK DRAFT by applicant will dilute opposer's mark BALL PARK,³ and that applicant has not used the mark BALLPARK DRAFT in commerce.

Applicant, in its answer, denied the salient allegations of the notice of opposition.

The record consists of the pleadings; the file of the involved application; and trial testimony, with related exhibits, taken by opposer. In addition, opposer submitted the following materials by way of notice of reliance: certified status and title copies of opposer's registrations; the discovery deposition of applicant's vice-president, Stuart Sheridan; copies of third-party registrations for marks which cover both frankfurters/hot dogs and beer; various articles from printed publications; and applicant's responses to opposer's requests for admissions. Applicant took no testimony and submitted no other evidence. Only opposer filed a brief on the case.

application was subsequently amended to claim first use and first use in commerce on March 27, 1995.

³ Opposer did not pursue its dilution claim and inasmuch as dilution is not a ground for opposition, we have given it no

Opposer is in the business of selling frankfurters, corn dogs, knockwurst, polish sausages, bologna, ham and bacon. The primary trademark of opposer is BALL PARK. Opposer advertises the BALL PARK brand on television, radio, newspapers, magazines and billboards, and at the point of sale of its products. Michael Jordan is the current spokesman for the BALL PARK brand and he has promoted the brand in numerous television and radio advertisements. Opposer has been a corporate sponsor of many professional sports teams and was a sponsor of the 1996 Summer Olympics. Over the past three years alone, opposer spent in excess of \$50 million advertising and promoting the BALL PARK trademark. In the past ten years, opposer sold more than \$1.2 million pounds of hot dogs. A survey conducted at opposer's request shows a total brand awareness of around 95% and an unaided brand awareness of around 50%. Over the years, opposer has actively policed its BALL PARK trademark.

Applicant operates a brewery in Cleveland, Ohio which produces a number of craft-style beers sold under various brand names. In late 1994 or early 1995 applicant chose the name "Ballpark" as a possible name for a new beer during a brainstorming session. At the time it adopted this mark, applicant was aware of opposer's BALL PARK mark.

consideration. See *Babson Bros. Co. v. Surge Power Corp.*, 39 USPQ2d 1953 (1996).

Applicant kegs it BALLPARK DRAFT beer and distributes it to a single customer, Sportservice, a concessionaire which is located at Jacob's Field in Cleveland, Ohio. The beer is advertised through the use of signs at the ballpark. Sportservice sells BALLPARK DRAFT beer at Jacob's Field for on-site consumption and the beer is not, nor has it ever been, distributed outside the state of Ohio.

Priority is not in issue because opposer's pleaded registrations for frankfurters and other processed food products have been made of record. King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

With respect to the issue of likelihood of confusion, we have, in making this determination, considered all factors, as set forth in In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), which are relevant. A detailed discussion of the evidence in this case is unnecessary, however, since as a result of applicant's admissions, no pertinent facts are in dispute. In this case, applicant failed to respond to opposer's requests for admissions and thus, the requests are deemed admitted. See Fed. R. Civ. P. 36(a).

Turning to the marks, applicant has admitted that the term "Ballpark" is the dominant element in applicant's mark; that the term "Draft" is descriptive; and that the parties'

marks are similar in appearance, sound and meaning, assessments with which we concur. In addition, applicant has admitted that opposer's BALL PARK mark is famous. Moreover, the record is sufficient to establish that opposer's mark is a famous mark for frankfurters. We note, in this regard, that where an opposer's mark is famous, that fact often weighs heavily in the determination of whether confusion is likely. *Kenner Parker Toys Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). Famous or strong marks enjoy a wide latitude of legal protection. Id.

Turning then to the goods, applicant has admitted that the goods of the parties are complementary; that they are advertised and promoted to, and purchased by, the same class of consumers; and that the goods are purchased on impulse. Further, opposer submitted over fifty third-party registrations for marks which cover meat and/or processed food products and beer. Although such registrations are not evidence that the marks shown therein are in use or that consumers are familiar with them, they nonetheless have some probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source.

In addition, opposer's evidence shows that at Jacob's Field in Cleveland, Ohio, applicant's BALLPARK DRAFT beer is

sold adjacent to the hot dog stands where opposer's BALL PARK frankfurters are sold. It is common knowledge that hot dogs and beer are frequently consumed together at such gatherings as sporting events, picnics and barbecues. Further, opposer's witness, Mr. Riley, testified that opposer has plans to license the BALL PARK trademark for use on products outside the meat category. Among the items which opposer has considered are beverages.

We find, therefore, that the parties' goods are sufficiently related that ordinary purchasers could reasonably believe that applicant's beer sold under the BALLPARK DRAFT mark emanates from or is sponsored by the same source which markets frankfurters under the famous BALL PARK mark. This is especially likely since there is no evidence in this record of any third-party use for food products or beer of marks which consist of the word "Ballpark."

We turn next to the issue of nonuse of the mark BALLPARK DRAFT in commerce. Applicant's witness testified that the following activities take place entirely within the state of Ohio: (1) brewing the product; (2) manufacturing the kegs to hold the product; (3) attaching the labels bearing the mark to the product; (4) transporting and distributing the product; (5) and selling the product. In addition, applicant stipulated at its deposition that all

its sales were made to Sportservice in Cleveland, Ohio. Further, in this regard, applicant has admitted that it has not transported, or caused to be transported, or sold goods bearing the mark BALLPARK DRAFT outside the state of Ohio.

We agree with opposer that applicant's intrastate use of the mark does not directly affect commerce which Congress may lawfully regulate nor does it satisfy the "use in commerce" requirement of the Trademark Act. See *Marita Spirits Ltd. v. Charles Jaquin Et Cie., Inc.*, 161 USPQ 240 (TTAB 1969); *In re Bagel Factory, Inc.*, 183 USPQ 553 (TTAB 1974); and *In re Cook United, Inc.*, 188 USPQ 284 (TTAB 1975).

Decision: The opposition is sustained on the grounds of likelihood of confusion and nonuse of the mark BALLPARK DRAFT in commerce.

J. D. Sams

E. J. Seeherman

P. T. Hairston
Administrative Trademark Judges
Trademark Trial and Appeal Board

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